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Supreme Court of the United States

October Term, [redacted] 1968

No. [redacted] 158

C. C. PEYTON, Superintendent of the Virginia State Penitentiary,

Petitioner,

v.

THOMAS EDWARD McLAREN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRELIMINARY STATEMENT

C. C. Peyton, Superintendent of the Virginia State Penitentiary, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on October 14, 1968, in the case of Thomas Edward McLaren v. C. C. Peyton, Superintendent of the Virginia State Penitentiary. The mandate was recalled and stayed on December 23, 1968.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit of October 14, 1968, will be found in the Appendix.

THE JUDGMENT

The judgment was entered on October 14, 1968.

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in this case is grounded upon 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Did The United States Court Of Appeals For The Fourth Circuit Err In Holding That The Imposition Of An Increased Sentence Upon Conviction Of A State Prisoner In A Retrial Is Unconstitutional?

STATUTES INVOLVED

§ 2254. *State custody; remedies in Federal courts*

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law

of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding. (28 U.S.C., Section 2254, as amended)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928." (28 U.S.C., Section 1254)

§ *53-272. Suspending sentence and placing on probation.* —After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at the bar is charged, if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest, the court may suspend the execution of sentence, in whole or in part, or the imposi-

tion of sentence or commitment, and may also place the defendant on probation under the supervision of a probation officer, during good behavior for such time and under such conditions of probation as the court shall determine. In case the prisoner has been sentenced for a misdemeanor and committed, or in case a jail sentence has been imposed upon the prisoner upon conviction of a felony, the court, or judge of such court in vacation may at any time before the sentence has been completely served, suspend the unserved portion of any such sentence.

In case the prisoner has been sentenced but not actually committed and delivered to the penitentiary for a felony the court which heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may place the defendant on probation under the supervision of the probation officer during good behavior, for such time and under such conditions of probation as the court shall determine.

In any case wherein a court is authorized to suspend the imposition or execution of sentence, such court may fix the period of suspension for a reasonable time, having due regard to the gravity of the offense, without regard to the maximum period for which the prisoner might have been sentenced.

In case the prisoner has been sentenced and committed to the penitentiary for a felony and the sentence is partially suspended, for purposes of good behavior credit and for parole eligibility, the term of imprisonment shall be that portion of the sentence which was not suspended. (Code of Virginia)

§ *19.1-291. Ascertainment of punishment in criminal cases generally when tried by jury.*—The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law. (Code of Virginia)

§ 19.1-249. Accused guilty of part of offense charged, sentence; on new trial what tried.—If a person indicted of a felony be by the jury acquitted of part of the offense charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor. If the verdict be set aside and a new trial granted the accused, he shall not be tried for any higher offense than that of which he was convicted on the last trial. (Code of Virginia)

STATEMENT OF THE CASE

In 1951 in the Corporation Court of the City of Danville, Thomas Edward McLaren was tried on six indictments charging him with forgery. He was sentenced to serve ten years on Indictment No. 1 and ten years on Indictment No. 2. He was also sentenced to serve ten years each on Indictment Nos. 3, 4, 5, and 6, but these four sentences were to run concurrently with the other ten year sentences. He, therefore received a total of twenty years in the penitentiary on the six charges involved.

On April 6, 1965, in the United States District Court for the Eastern District of Virginia, Richmond Division, the aforesaid sentences imposed upon the six indictments were declared void because McLaren had been denied the right to appeal from said judgments. The effect of the order was stayed for a period of ninety days to permit the Commonwealth to re-try him.

McLaren was re-tried on June 11, 1965, on Indictments 1 through 5. He was not re-tried on Indictment 6. However, he was tried on each indictment for forgery, as alleged in Count No. 1, and for uttering, as alleged in Count No. 2. He received three years on each count of each indictment, or a total of thirty years in the penitentiary. On his retrials, he was tried by a jury.

Subsequent to his convictions in 1965 and after proceeding in the State courts, he filed for relief in the United States District Court for the Western District of Virginia at Danville. Relief was denied him on April 15, 1968. The opinion of the United States Court of Appeals for the Fourth Circuit followed.

ARGUMENT

The Superintendent will demonstrate that the decision of the court below holding that a prisoner cannot receive a greater sentence on retrial after the issuance of a writ of habeas corpus is without basis in law. Moreover, the Superintendent will show that the court below has ignored this Court's decision in *Robinson* v. *United States*, 324 U.S. 282; rehearing denied 324 U.S. 889; second rehearing denied 325 U.S. 895 (1945).

The United States Court Of Appeals For The Fourth Circuit Erred In Holding That The Imposition Of An Increased Sentence Upon Conviction Of A State Prisoner In A Retrial Is Unconstitutional.

The facts in the case at bar may be summarized briefly as follows. In 1951, the prisoner received a total of sixty years in the penitentiary on six indictments for forgery. Four of the ten year sentences, however, ran concurrently with the other ten year sentences, and consequently he only had to serve twenty years in the penitentiary. On retrial, however, he received a total of only thirty years in the penitentiary, but none of the sentences ran concurrently, and consequently the prisoner is required to serve ten years more as a result of his retrials.

The prisoner relies principally upon the decision of the United States Court of Appeals for the Fourth Circuit in *Patton* v. *North Carolina*, 381 F.2d 636 (1967). In the

first place, unlike *Patton*, the prisoner received credit for the time served on his void sentence in accordance with the decision of the Supreme Court of Appeals of Virginia in *Stonebreaker* v. *Smyth*, 187 Va. 250, 46 S.E.2d 406 (1948). Moreover, in this case at bar, the prisoner was tried by a jury. In Virginia, of course, the jury fixes the punishment to be imposed (§ 19.1-291, Code of Virginia). No one has suggested that § 19.1-249 of the Code, which provides that if on direct appeal the judgment is set aside, the accused cannot be convicted of a higher crime to mean that an increased sentence cannot be imposed. The Seventh Circuit Court of Appeals in *United States* v. *Russell*, 378 F.2d 808 (1967); and *United States* v. *White*, 382 F.2d 445 (1967), held that a greater sentence can be imposed upon retrial. (See also, *Marano* v. *United States*, 374 F.2d 583 (1967).)

The prisoner suggests in effect that this Court should judicially amend Virginia law and require that at the time of the retrial the instructions given the jury as to the amount of punishment to be imposed must contain language limiting the sentence to that previously imposed. This suggestion is clearly without merit and unsupported in law. Moreover, it is clear that the court below refused to follow the decision of the Court in *Robinson* v. *United States*, *supra*. In *Robinson*, the petitioner was serving a life sentence for kidnapping and had the same set aside because he did not intelligently waive counsel. At his second trial, he was sentenced to death. This Court upheld this conviction, and it is submitted that *Robinson* is controlling herein, *if this matter is to be considered on the merits.*

The court below, in effect, by its opinion has judicially amended the Virginia law by requiring that at the time of the retrial, the instructions given the jury as to the amount of punishment to be imposed must contain language limiting the sentence to that previously imposed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted, and the judgment in this case reversed.

Respectfully submitted,

ROBERT Y. BUTTON
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RENO S. HARP, III
Assistant Attorney General of Virginia

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Reno S. Harp, III, an Assistant Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the bar of the Supreme Court of the United States, do hereby certify that on this 13th day of January, 1969, I mailed a copy of the foregoing Petition for a Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to Thomas Edward McLaren, No. 60745, at 500 Spring Street, Richmond, Virginia.

RENO S. HARP, III
Assistant Attorney General

APPENDIX

MEMORANDUM DECISION

Thomas Edward McLaren appeals from an order of the district court (Dalton, J.) denying his petition for a writ of habeas corpus. A certificate of probable cause to appeal was granted below.

McLaren attacks the validity of convictions for forgery and uttering obtained in the Danville, Virginia, Corporation Court in 1965. He contends that the convictions were invalid because of prejudicial pre-trial publicity and the introduction into evidence of an oral statement obtained without his having been advised of his right to counsel, as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). He further contends that even if the convictions are valid, his sentence was unlawful, in that it was increased from the punishment he had originally received for the same offense, and is therefore unlawful under *Patton* v. *North Carolina*, 381 F.2d 636 (4 Cir. 1967).

The district court held a plenary hearing, in addition to studying the trial transcript, and found that the statement was voluntary, and therefore, since the trial was conducted before the *Miranda* decision, the failure to advise McLaren of his right to counsel did not render the statement inadmissible. We agree. The introduction, into a pre-*Miranda* trial, of a statement obtained without the *Miranda* warnings having been given does not constitute a ground for habeas corpus relief, *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), if the statement is in fact voluntary.

The district court also found that the newspaper articles referred to by McLaren did not constitute prejudicial pre-trial publicity under the principles of *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). Many of the articles were in fact published *after* the trial, and those published before trial

were in no way inflammatory, nor were they such as would likely create a situation in which a jury could not be found which could impartially consider the question of guilt. Some of the articles did contain a misstatement of fact not relating to McLaren's innocence or guilt, but relating to the length of the sentence imposed on his original trial. We consider McLaren's contention regarding the length of his sentence below.

McLaren also claims that he was subjected to increased punishment on retrial. In 1951 McLaren was tried on six indictments charging forgery and uttering. He was convicted on all the charges and received a ten year sentence on each indictment. Sentences on indictmets two through six ran concurrently with each other and consecutively to the sentence on indictment number one, resulting in a term of imprisonment of twenty years. Subsequently the convictions were declared void, and McLaren was retried on the first five indictments. The state elected not to retry him on the sixth indictment. At his retrial in 1965 he was again convicted on all counts, and he received three year sentences on each count of each indictment, for a total of thirty years. All sentences were to run consecutively. The district judge recognized that the punishment had indeed been increased on retrial, but held that *Patton* v. *North Carolina*, 381 F.2d 636 (4th Cir. 1967), which declares such increased punishment to be impermissible, did not apply to the case, since the sentences were imposed by a jury rather than a judge. We held in *May* v. *Peyton*, ... F.2d ....., No. 11,438 (4 Cir. 1968), that there is

> "* * * no distinction in the application of the doctrine announced in *Patton*, where either or both sentences was imposed by the court or by a jury. Petitioner could not constitutionally be resentenced to a term

in excess of that originally imposed with credit for the time served under the void sentence." ..... F.2d ....., ...

The situation here is precisely the same as in *May*. Although each individual sentence in the present case is less than the previous sentence on the same indictment, the change in the manner in which the sentences were to be served, in that all of the sentences were made to run consecutively, causes McLaren to be imprisoned for ten years more than he would have served had he not challenged the original convictions. The rule of *Patton* therefore applies.

Accordingly, the judgment of the district court is reversed, and the case is remanded with directions that the district judge enter an order that McLaren be granted his release unless within a reasonable time he is constitutionally resentenced, with full credit for all time served under invalid sentences, in accordance with *Patton*.

/s/ HERBERT S. BOREMAN
United States Circuit Judge

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ HARRISON L. WINTER
United States Circuit Judge